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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Revise the Network Non-duplication Rules	)	RM-

PETITION FOR RULEMAKING OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc., by its attorneys, hereby petitions the Federal Communications Commission, pursuant to Section 1.401 of the Commission's rules, to commence a rulemaking proceeding to revise its rules governing the duplication of broadcast network programming on cable television systems. 47 C.F.R. Section 76.92-76.97. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators, programmers, equipment suppliers, and other affiliated with or interested in the cable industry.

INTRODUCTION

The 1992 Cable Act for the first time gives local commercial broadcasters the choice of either requiring operators to obtain broadcasters' consent to retransmit their signal, or forcing operators to carry the signal without the operators' consent.[1/]

1/ P.L. 102-385, 102d Cong., 2d Sess. (Oct. 5, 1992); Sections 4 and 6; 47 U.S.C. Sections 614 and 325(b).

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Under Section 325(b), local commercial television stations can elect to negotiate with cable operators over whether to authorize carriage and on what terms. Television stations are given the further advantage of opting to force cable carriage, under the terms of the mandatory carriage provisions of Section 614 of the Act, and automatically gaining favorable channel positioning and other manner of carriage protections.

This "heads I win, tails you lose" scheme has the potential to cause significant disruption to existing services and loss of access to broadcast signals that cable viewers have enjoyed for decades.[2/] In addition, it creates an environment for the retransmission of local and distant broadcast signals radically different from that which has governed cable broadcast signal carriage for over 30 years.

Several FCC rules, in particular the network non-duplication rule, cannot rationally survive in this new signal carriage environment. Continuing to provide this existing layer of protection afforded by the Commission rule, on top of that which the Cable Act newly grants broadcasters, unfairly skews the marketplace in favor of broadcast affiliates. And it markedly increases the chances that the real losers in this new regime will be the cable viewing public.

2/ We also contend that it violates the First Amendment. See NCTA v. U.S., No. 92-2495 (D.D.C., filed Nov. 5, 1992). But assuming, arguendo, that the court does not strike down these Cable Act requirements, a revision to the network non-duplication rules is clearly in order.

The network non-duplication rule provides network affiliates the right to require blackouts of network programming on more distant stations, regardless of whether the more local network affiliate is even carried on a cable system. We submit the rules cannot continue to operate as before, given the sea change in the legal status of operators' broadcast signal retransmissions.

Accordingly, NCTA hereby petitions the Commission to initiate a rulemaking proceeding to revise its network non-duplication rule to eliminate the application of the rule for those local stations that elect retransmission consent under Section 325(b). We seek to modify the rules to ensure that an affiliate electing retransmission consent that is not carried on the cable system may not assert non-duplication rights against a distant affiliate. In addition, where a station elects retransmission consent and a carriage agreement is reached, the extent to which non-duplication rights could be asserted would be an element of the marketplace negotiation between the station and system, rather than a regulatory requirement.

A. The Network Non-Duplication Rule is an Anachronism in the Face of Retransmission Consent Requirements

The FCC first adopted general network non-duplication rules applicable to cable television systems using microwave to obtain signals in 1965.[3/] This protection was extended to network

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3/ First Report on Microwave Relays (Dockets 14895, 15233), 4 R.R.2d 1725 (1965).

affiliates carried on any cable system the next year.[4/] An examination of the history of the network non-duplication rules demonstrates that the concerns prompting non-duplication protection no longer form a valid basis for the rules' continuation in the face of the Cable Act requirements.

Network non-duplication requirements were adopted in 1965 in large part because the Commission had determined that the retransmission consent requirement of then-Section 325 did not apply to cable television. According to the Commission: "we believe that reasonable non-duplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the rebroadcasting consent proposal is, in large part, aimed." [5/] Network non-duplication rights, coupled with mandatory carriage obligations, at that time were "designed to create reasonably fair and open conditions to competition between CATV and broadcasting stations as alternative ways of making television programming available to the public."[6/]

The Commission last revised its network non-duplication rules in 1988 as part of its decision to reimpose syndicated exclusivity.[7/] The FCC for the first time enabled network

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4/ CATV, 2 FCC 2d 725 (1966).

5/ 4 R.R.2d 1752 n.37.

6/ Id. at 1759.

7/ Amendment of Parts 73 and 76 of the Commission's Rules, 3 FCC Rcd. 5299 (1988), recon., 4 FCC Rcd. 2711, aff'd, United Video v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

affiliates to invoke non-duplication rights without being carried on the cable system.[8/] This aspect of non-duplication was a response to "the fear that cable systems, in the absence of must carry rules, will threaten to withhold carriage from broadcasters who wish to exercise their exclusivity rights."[9/]

Network affiliates now have the option of electing mandatory carriage on cable. There is simply no continuing justification for allowing affiliates to exercise exclusivity rights when they elect retransmission consent instead of must carry. Nor is there any reason -- given the statutory ability of distant and local signals to negotiate compensation for carriage on cable -- to continue to allow stations to automatically demand the blackout of duplicating programming on more distant signals. Rather than fostering "reasonably fair and open" competitive conditions, the network non-duplication rules instead skew that competition heavily in favor of broadcasters.

B. The Commission is Obligated to Revise its Rules in the Face of "Changed Circumstances"

The Commission is obligated to reexamine its rules where "it is plain that [the] justification has long since evaporated."[10/] As the D.C. Circuit has instructed, "even a statute depending for its validity upon a premise extant at the time of enactment may

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8/ 3 FCC Rcd. at 5320.

9/ Id. at 5314 (emphasis supplied).

10/ Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979).

become invalid if subsequently that predicate disappears." Id. Without question, such is the case here.

The Commission has adopted rules that are designed to remedy an alleged competitive imbalance that occurs where operators can retransmit broadcast stations without the consent of that station, or where operators could opt not to carry the station and instead provide the same programming from a different station. But that is no longer the case. Instead, with limited exceptions not relevant here, a cable system must obtain the consent of any "local" commercial station that does not opt to exercise its mandatory carriage rights. Congress envisioned broadcasters having a choice under this new regime -- one in which they can force their way on to cable system under the must carry rules, or one in which they can negotiate for carriage rights in a quasi-marketplace.

If this retransmission consent "marketplace" is to function, then the non-duplication rules must be revised. Otherwise, a local network affiliate, having selected retransmission consent, can ensure that no network programming is available to cable subscribers on the cable system. The value of its signal would not be determined in the "marketplace." Rather, its ability to block cable subscribers' access to network programming would enable the station to reap benefits wholly unrelated to the particular signal's attractiveness to the cable audience. A network affiliate would not be engaging in a "free" marketplace transaction, but one in which the deck is stacked even more heavily in its favor.

Continuing to automatically allow the assertion of exclusivity rights in these circumstances would neither further an open "marketplace" nor serve the public interest.

First, the public interest in ensuring the continued supply of network programming to cable subscribers is plain. Indeed, "one of [the Commission's] goals [in adopting omnibus cable regulations], with which there has been little basic disagreement, has been to assure that all cable subscribers have full network service available."[11/]

Second, Congress, in the 1992 Cable Act, has attempted to provide a level playing field for the provision of video programming by all competing multichannel video programming distributors. All such distributors are subject to the retransmission consent requirements. However, the Commission's rules do not require any multichannel video distributor other than cable systems to provide protection against duplication of network programming. Continuing to impose regulatory non-duplication restrictions on only one competitor in this marketplace not only is inherently unfair to cable system operators, but also is in conflict with the Act's underlying

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11/ Reconsideration of the Cable Television Report and Order, 36 FCC 2d 326, 333 (1972). Even in adopting severe restrictions on distant signal carriage, the Commission specifically allowed all cable operators to import network affiliates to ensure that subscribers had access to a full complement of network service. Cable Television Report and Order, 36 FCC 2d 143, 177 (1972).

premise of ensuring more equal conditions applicable to those competitors.

Finally, the proposed approach in part would return the network non-duplication rules to where they were before 1988 -- that an affiliate in order to assert non-duplication rights must be carried on the system. If an affiliate has entered into an agreement that enables it to assert rights against more distant stations, then the exercise of exclusivity should be a matter of negotiation between the system and the station in the retransmission consent "marketplace." Non-duplication protection, then, would not be the result of government fiat but the consequence of a more truly "competitive marketplace."

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission institute a rulemaking proceeding to eliminate the application of the network non-duplication rule to stations opting for retransmission consent from a cable system. If the marketplace for cable signal carriage is to function as Congress envisioned, then this rule must be revised to take into account this new marketplace reality.

Respectfully submitted,

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January 19, 1993

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